127-674

SUPREME COURT OF THE UNITED STATES.

No. 138.

ERMANCE DE ST. ROMES

versus

THE LEVEE STEAM COTTON PRESS COMPANY.

BRIEF IN BEHALF OF PLAINTIFF, APPELLANT.

CHS. LOUQUE,
Of Counsel.

L. GRAHAM & SON, PRINTERS, 101 GRAVIER ST., N. O.

SUPREME COURT OF THE UNITED STATES.

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versus

THE LEVEE STEAM COTTON PRESS COMPANY.

BRIEF IN BEHALF OF PLAINTIFF, APPELLANT.

Widow J. C. de St. Romes, complainant's mother, was the owner of 66 shares of the capital stock of the Levee Steam Cotton Press Company, defendant.

On the 29th of July, 1853, one Pierre Deverges, signing himself "*pr pro W. St. Romes,*" transferred on the books of the company the 66 shares of stock to C. A. Cohen. R. 73.

On the same day C. A. Cohen transferred the identical stock to Peschier and Forstall. R. 73.

Again on the same day Peschier and Forstall transferred the stock to A. & M. Heine. R. 74.

A. & M. Heine already owned 230 shares of stock when they bought the 66 shares. They shortly after bought 146 shares more, thus owning in 1853, 442 shares. In 1856 the 442 shares were sold by A. & M. Heine to divers persons in small lots, and these purchasers in their turn retransferred their shares, so that since 1856 all trace of the 66 shares was lost and they became mingled with the general stock of the company. R. 40.

This fact was admitted by the defendant in an amended answer. R. 38.

In 1861, which was, therefore, eight years after the transfer by Pierre Deverges, Widow de St. Romes filed her first suit against the defendant, claiming the dividends accrued on her stock from 1848 to 1853, and asking that she be recognized as the owner of the 66 shares. R. 51, 52.

The Supreme Court of Louisiana decided: "That on the "merits the case presents a simple question of fact: Was Pierre "Deverges the duly constituted agent of the plaintiff, to receive "payment of and to grant a valid acquittance of these divi- "dends *and to sell her stock*?

"A careful perusal of the testimony in the record, *the fact of "the destruction of the company's papers being* borne in mind, "has failed to satisfy us that Deverges was clothed by the "plaintiff with authority either to receive her dividends for the "years in which they are now claimed, OR TO SELL HER "STOCK IN THE COMPANY."

"The plea of prescription is untenable.

"The possession by the company of the dividends declared "by it being that the possession of a mandatory is a precarious "one, unless it shows some initial point at which its possession "was one *animo domini*.

"It is discretionary with incorporated companies to declare "dividends whenever they think proper, and it is only from the "period at which a stock-holder becomes aware of his right to "claim dividends in his favor, that the vice of precariousness "is purged, that the nature of the possession becomes "changed, and the initial point for prescription is deter- "mined." R. 19.

On re-hearing the Court said:

"A re-hearing has been granted in this case for the purpose "of amending the decree on the prayer of the appellant to the "effect that she be recognized as the legal owner of the stock "claimed, or her right to claim it be reserved.

"As the alleged transferee of the stock was not a party to "this suit, the plaintiff could not justly be recognized as "owner of the stock in question, but we think a legitimate "sequence to our opinion heretofore expressed is a reservation "of her right to claim said stock in a proper proceeding.

"It is, therefore, ordered that the decree rendered herein by "us be amended by adding the words, "and that plaintiff's "right to claim in a direct action the stock in controversy "herein be reserved." R. 21.

This decision is reported in the 20th Louisiana Annual, p. 381. The briefs filed by counsel are printed in the report.

The above decision was rendered by the Supreme Court of Louisiana in the month of June, 1868.

On the 23d of November, 1867, Widow de St. Romes transferred to Eugene de St. Romes, one of her sons, "all rights, claims and demands whatsoever which she has or may have against the Levee Steam Cotton Press Company" in the above case. R. 53.

On the 9th of June, 1868, on motion of plaintiff's counsel, the subrogation and transfer were filed of record, and on the same day notified to the Levee Steam Cotton Press Company. R. 53.

On the 15th of June, 1868, the Levee Steam Cotton Press Company, through their counsel, E. Bermudez, Esq., *now Chief Justice of the Supreme Court of Louisiana*, took judicial notice of the subrogation and asked the Court to deposit the amount of the judgment lately rendered and be relieved from further liability, and asked that Widow de St. Romes and her transferee, E. de St. Romes, be notified. R. 57.

Later on, July 3d, 1868, after trial of the issues raised over the funds, the same were ordered paid to Eugene de St. Romes, the transferee. R. 59.

So that it is beyond dispute, that on July 3d, 1868, Eugene de St. Romes was the transferee of *all the rights, claims and demands whatsoever which* Widow de St. Romes had or might

have against the Levee Steam Cotton Press Company, and that her said rights consisted of the sixty-six shares of stock and the accrued dividends; that the Levee Steam Cotton Press Company had judicial notice of the transfer.

On the 7th of May, 1874, Eugene de St. Romes died intestate, leaving as his sole heirs his mother, Widow de St. Romes, his brother Victor, and the present plaintiff, Ermance de St. Romes.

On the 15th of August, 1874, Victor de St. Romes died intestate, leaving, as his sole heirs, his mother, Widow de St. Romes, and the plaintiff. R. 49–50.

On the 21st of October, 1874, Widow de St. Romes, the mother, renounced the successions of her sons in favor of her daughter, Ermance. R. 50.

So that on the 21st of October, 1874, Miss Ermance de St. Romes was the sole owner of the sixty-six shares of stock in controversy.

In 1871 Widow de St. Romes, by error, we presume, for she subsequently recognized the fact, brought a suit against the Levee Steam Cotton Press Company, *and the supposed owners of the stock*, for the sixty-six shares of stock. R. 24 to 26.

On the day of the trial her attorney admitted that the defendants, if in court, would testify that since July, 1853, they have been receiving the dividends as owners, and have been exercising control of the stock as such. Rec. 92.

Thereupon the prescription of three years was pleaded by defendants and maintained by the Court.

Of course it is apparent from this statement of facts:

First. That Widow de St. Romes was not the owner of the stock when she brought her suit in 1871, when she made the admission and when the judgment was rendered.

Second. That none of the defendants in said suit held her stock, for it is in evidence in this cause and admitted by the Levee Steam Cotton Press Company, that since 1856, when A. & M. Heine began to sell their stock in small lots, that Mrs.

de St. Romes' stock could not be traced up. Rec. 37-38. See to the same effect the testimony of J. C. Denis, President of the Cotton Press, Rec. 75; of W. E. Sevey, Secretary of the Company, on cross-examination, R. 70.

It seems curious that in the course of this litigation the great objection constantly urged against plaintiff was that she could not be recognized as owner of the stock unless the transferees were parties, yet in this particular case the Supreme Court passed on the question of ownership, although neither plaintiffs nor defendants had any interest in the 66 shares. Plaintiff disclaimed her title before the Supreme Court, but that Court insisted on deciding the cause. 31 A. 224, *de St. Romes vs. Levee Steam Cotton Press Company.*

In 1876, Miss Ermance de St. Romes, the present complainant, brought a suit in the State Court against the Levee Steam Cotton Press Company for the dividends declared by them on the stock. R. 20. Ex. F. The suit was based on the theory that the plaintiff was yet the owner of the 66 shares of stock never having disposed of the same; that the certificate of the Company was only the evidence of ownership, and, although the evidence had been improperly cancelled or destroyed, the incorporeal right was nevertheless unaffected.

The defendants excepted to that suit on the ground that certain persons named in another suit brought by Wid. de St. Romes *five years previous*, should have been made parties. R. 54.

The exceptions were originally filed and tried in the Superior District Court for the Parish of Orleans, and were overruled.

After filing of the answer and the striking out of the call in warranty, the Superior District Court was abolished and the case transferred to the Third District Court for the parish of Orleans.

A rule was then taken by the Levee Steam Cotton Press Company to reopen all preliminary defences. R 55.

That rule was made absolute. and the preliminary defence were again tried and overruled.

The answer of the Cotton Press to that suit found at p. 90, was that Widow de St. Romes had transferred her stock through her agent Pierre Deverges, and the Company called in warranty the supposed transferees. R. 90. The case went to trial and plaintiff recovered judgment for the sum of $9900, the amount of dividends then declared. R. 91.

The Supreme Court of Louisiana reversed this judgment and dismissed the cause for want of proper parties. R. 21. This decision is copied at p. 15.

Your Honors will please notice that the names of the transferees given in that answer are entirely different from the one given by the Cotton Press Company in this suit.

For the purpose of showing what little weight can be attached to the decision of the Supreme Court, in this case, and how little they examined the case before deciding it, you will perceive that in their answer, the Levee Steam Cotton Press Company gave the names of the different persons who should be called in warranty, thus:

"That C. A. Cohen departed this life, and his succession is represented by his widow individually and as tutrix;"

"That said Peschier & Forstall have dissolved their partnership; that the former has departed this life and is represented by his heirs;

"That Alexander Smith departed this life and has left heirs, all of whom are absent from France and unrepresented in this State;

"This defendant therefore prays that all said persons be made parties to this suit," etc. R. 90.

How was it possible to make parties in this manner?

The record of this last effort on the part of complainant to obtain redress from the State Court is scattered in the record so that one not familiar therewith could not reconstruct it; thus the petition is found at p. 21, Ex. F; the exceptions at p. 54;

the rule to reinstate the preliminary defenses at p. 55; the answer at p. 90; the judgment of the lower Court in favor of plaintiff at p. 91; and the judgment of the Supreme Court at p. 21. This same judgment, with the reasons for refusing a rehearing are reported in the 34 A. 419, *E. de St. Romes vs. Levee Steam Cotton Press Company.* Your Honors' special attention is called to the reasons given for refusing the rehearing. This last case was decided in 1882.

On the 9th of December, 1882, the present suit was brought before the Circuit Court for the Eastern District of Louisiana, wherein the complainant now claims from the Defendant Corporation a new and original certificate for her 66 shares of stock in lieu of her two original certificates cancelled by it, without authority, and in fraud of her rights, also an account of all accrued dividends thereon, and her *pro rata* share of the distribution of the assets of the Company, which was then in process of liquidation. Meanwhile she obtained an injunction to prevent the defendant corporation from disposing of their assets to her prejudice.

Mr. Jules C. Denis, the President of the Company, testified that "a final dividend of $3.75 per share had been declared, 'payable on the very day that the injunction was issued, "arresting the money in my hands, about 9 o'clock in the "morning.

"If it was three hours later I would have got through. The "amount to pay the dividend was in bank and over and above "it, some $400, more or less." The dividend was derived "from the winding up of the Levee Steam Cotton Press Com-"pany and the sale of the property." R. 70.

The injunction only arrested the payment of the final distribution. R. 80.

1st. The defendants' answer admits the issue of the original certificate; alleges that the stock was transferred by Widow J. C. de Romes, through her duly constituted agent, Pierre Deverges, in 1853.

2d. That the cotton press with its books and papers was destroyed by fire in 1859, and its secretary, then in charge of its affairs, is now dead.

3d. It denies the ownership of the complainant to the stock.

4. That plaintiff's transferrer waited until the death of her agent to bring her first suit in 1861.

5. An account of the dividends is annexed to the answer.

6. The defendant further alleges that H. Gally is the present owner of plaintiff's 66 shares of stock.

7. The prescription of three years is pleaded as a bar to plaintiff's demand, on the ground that the persons to whom the said agent of Widow de St. Romes transferred the stock, have purchased the same in good faith and held the same as such for more than three years.

8. The prescription of ten years is also pleaded.

9. It avers that in 1871, Widow de St. Romes instituted suit against the defendant and C. A. Cohen's transferees, which was decided adversely to her; hence this decision is pleaded as *res judicata*.

10. That the present plaintiff brought suit in 1876 for dividends, and the Supreme Court dismissed her case for want of proper parties, which dicision is also pleaded as *res judicata*.

11. Want of proper parties is also urged.

12. That the company has 5000 shares out, and can issue no more certificates. R. 9 to 13.

The plaintiff excepted to defendant's answer on the grounds:

1. That it has no right to avail itself of its own wrong so as to defeat her claim; that if the defendant properly transferred her stock, her case is at an end; that as regards all other defenses set up, if they do exist, they could have sprung in existence only by reason of the illegal transfer which this defendant company made; and it cannot avail itself, either in equity or law, of its unlawful acts as a bar to plaintiff's claim.

2. That no privity exists between the present holders and plaintiff. That if neither she nor her assignors have ever transferred their stock, they are still the owners thereof, and the other holders, whom defendant avers should be made parties, hold other shares issued by said company, and not hers.

Plaintiff thereupon prayed that all defenses except the one alleging the lawful transfer of the 66 shares be expunged from the answer.

The exceptions were overruled.

No comment is necessary to show how legal and just the exceptions are.

The defendant then filed an amended answer re-iterating the plea of *res judicata* based on the first decision of the Supreme Court.

It averred that H. Gally was now the present owner of the 66 shares of stock.

That plaintiff can only sue at law for the negligent or fraudulent transfer of her stock.

That the prescription of one year bars plaintiff's claim.

That the stock was sold with plaintiff's full authority. R. 30 to 31.

Thereupon complainant filed a supplemental bill reserving her exceptions and making H. Gally a party.

H. Gally appeared and claimed that he held his stock as a purchaser in good faith for a valuable consideration, and that he does not hold plaintiff's shares. R. 35 to 37.

The Levee Steam Cotton Press Company now for the first time seems to have appreciated the actual condition of affairs. They filed an amended answer in which they aver that their previous statement that H. Gally was the present owner of stock, is "*in part erroneous.*" They then explained, what plaintiff knew from the beginning, that A. & M. Heine had owned a great many shares, and had sold them in small lots, and the then purchasers again made transfers, "UNTIL BY THE EFFECT OF ALL THESE SALES AND TRANSFERS, all the

shares ever owned by said A. & M. Heine have become mingled with and included in the 5000 shares of the capital stock of this Company, all owned by the present shareholders." R. 38.

So that the cause has come to this that plaintiff is claiming from the defendant a new certificate for her share of stock, and the Levee Steam Cotton Press Co. finds that it cannot trace what became of her stock, or who are the owners of it, and because it cannot trace the stock plaintiff must bear the loss.

And such has been the status of this cause since 1856. And simply because of the bad faith of the defendant Company in suppressing the true state of affairs, it has succeeded for years in defeating plaintiff of her just claims.

It seems that this judicial admission of the Levee Steam Cotton Press Company has divested this cause of all the complications with which the Louisiana Supreme Court had clouded it, and has presented their decisions in the most horrid light of unfounded, technical injustice.

How the Levee Steam Cotton Press Company can now insist on these decisions as being *res judicata*, is more than an honest, judicial mind can understand?

More will be shown anon.

The dismissal of a suit for want of proper parties has never operated as *res judicata*, and by the nature of things cannot be considered as deciding the rights of litigants.

Complainant admits that H. Gally does not own her shares; in fact, no one but herself owns them, for she has never parted with its ownership; therefore, H. Gally will be eliminated as a party defendant, and the cause shall proceed as between complainant and the Levee Steam Cotton Press Co.

Before examining the merits of the answers, we insist that the defendant should be limited to the one defense, *i. e.*, that it properly transferred plaintiff's stock by the authorization of her duly constituted agent, Pierre Deverges.

It is clear that if this particular ground of defense be true, plaintiff's case is at an end.

Why then allow defendants to plead contradictory defens es? It is only in the event that plaintiff did not authorize the transfer that the other defenses are of any avail. Then the company committed a wrong, and should not be allowed to shield itself by reason of its wrong. If a defendant pleads payment, he will not be allowed to contest the debt.

The plea that defendant has transferred plaintiff's stock, on complainant's order, is in the nature of a plea of payment or satisfaction.

But supposing that the defences were not contradictory, it is plain that they have come in existence by reason of the unlawful acts of the defendants.

Equity will not allow any one to take advantage of his own wrong.

The only question in this case is whether Pierre Deverges was the duly constituted agent of complainant to sell her stock?

The Supreme Court of Louisiana answered this question in the negative, when the evidence was far from being as over helming in favor of complainant as it is in this cause. 20 A. 381. The evidence on which that case was decided is found at pp. 86 to 88 of the transcript.

In that cause, the Supreme Court took in consideration the fact that the fire had consumed the books of the company. That a fire did occur we admit, but that the book affecting the precise issue of transfer was destroyed, we deny. That book was produced before the examiner in this cause, and to the shame of the defendants be it said, that on the very page on which Pierre Deverges, the pretended agent, without power, was allowed negligently by the company to falsify their record, was found pasted on three different transfers, three various powers of attorneys authorizing agents to accomplish the mandate of their principals. This was evidence which had been suppressed for many years by the company, and for the first time produced in the cause. If any doubt ever existed,

there is none now, that Pierre Deverges had no power of agency.

The destruction of the cotton press books and records by fire was only a sham, a pretence.

A circumstance which should have aroused the suspicion of the cotton press as to the validity of the transfers, was that on the same day three transfers of the same stock were made, two of them to brokers. R. 65, 66, 67.

We further impugn the good faith of the cotton press company, because in 1861, when a suit was brought against them, they never attempted to shield themselves from any claim of plaintiff, or to have the matter promptly adjusted; they kept on paying dividends to the exclusion of the complainant even after her rights were recognized by the Supreme Court.

How can a court of justice listen with willing ears to a defendant whose defences have heretofore been based entirely on falsified facts?

The title of plaintiff to the sixty-six shares is indisputable. Her mother was the owner and this is admitted. She has never parted with her shares except to her son Eugene de St. Romes, (R. 53), and when Eugene died in 1874 the complainant finally became the sole owner by inheritance. She was duly recognized as such by a solemn judgment of the Probate Court. R. 49, 50, 51.

As regards the pleas of prescription of one, three and ten years, the Supreme Court of Louisiana disposed of this issue. R. 19, 20 A. 381.

The prescription of ten years is not applicable because the transfer was made in 1853, and the first suit was instituted in 1861. The decision in that cause was rendered in 1868. The next suit by the proper plaintiff was instituted in 1876, and finally decided in 1882.

This cause was brought in 1882. We admit that the account of dividends and the distribution of forty-five dollars

per share as set forth in the answer, is the correct amount to which the plaintiff is entitled.

As regards the pleas of *res judicata*, we hardly think, in view of the admissions made in this record, that the defendants will insist thereon.

The only point, therefore, decided against complainant is to the effect that the alleged transferees should be made parties to this suit.

It is in evidence that there are no alleged transferees; that the whole company is the alleged transferee.

By what sort of logic can the defendant reason thus: I have illegally transferred your stock, it is in such condition now that I do not know where it is and cannot recover it, therefore, you must bear the loss and cannot obtain a new certificate?

We do not claim any stock, for we have our 66 shares still; all we desire is that the Company shall give us a new certificate, in other words, a new deed for the title which they illegally destroyed.

The plea of *res judicata* can only be based upon a decision rendered—a right which had been passed upon. A non-suit cannot form the basis of a plea of *res judicata.* We have always understood that the dismissal of a case for want of proper parties amounted to a non-suit.

The logic of the dismissal for want of proper parties is that no decision could have been rendered in their absence. It is, therefore, in the very nature of things, impossible to maintain the plea of *res judicata* in this cause.

Of course, the defendant cannot in this cause insist on a want of proper parties. The Court, therefore, must pass through the mass of technicalities behind which the defendant Company seeks refuge, to divest complainant of her property, and decide this cause on its real merits.

If your Honors find that Widow J. C. de St. Romes had not given a power of attorney to Pierre Deverges to sell her stock, complainant should get her relief.

The last objection is that this corporation cannot exceed in its issue of stock the 5000 shares which are all out.

This is not true, for the two acts of the Legislature creating the defendant corporation fixed the capital stock at $200,000 with the right to increase same to $1,000,000. R. 92, 93.

Five thousand shares at $100 each only amount to $500,000. Complainant does not ask the defendant to increase the number of their outstanding shares. She has never parted with hers. It was the shares issued to the other parties which was an over-issue, if such there be.

Supposing for one instant that the defence had proven that, as a matter of fact, without Mrs. de St. Romes, or her transferee's consent, the stock had actually been transferred, what would the legal consequence be, as regards the Levee Steam Cotton Press Company?

Simply that, having permitted an unlawful act to be done and having assisted the wrong-doer in accomplishing his purpose, they have become responsible towards the plaintiff for the loss she has sustained. The prescription of ten years is the only one applicable, and that has never accrued.

Can your Honors, sitting to do justice between these parties, hear the defendant urge that plaintiff's rights have been lost by reason of an unlawful act which they did towards her?

"*Nemo est audiendus allegans suam turpitudinem*" is a maxim which should be applied in this cause, because the Company assisted Pierre Deverges in accomplishing a wrong. N. Y. & N. H. R. R. Co. vs. Schuyler, 34 N. Y., 30; 11 Wallace, 669; Banks vs. Handy.

The trustees of a joint association are the trustees of the stockholders, and if they suffer stock to be transferred to a *bona fide* purchaser without notice, by a person not having authority to make the transfer, the loss in a contest between such purchaser and the stockholders ought to fall on the latter.

A corporation in the issue and transfer of stock is bound to exercise such ordinary care and skill as affords to dealers a safe and reliable mode of acquiring title to its shares, and this obligation exists, not only towards shareholders, but towards the public generally.

Taney, 310; 5 S. C. 379; 42 Cal. 139; 52 Pa. 232; Md. Court of Appeals, 1859, *Chew vs. Bank of Baltimore.*

"A corporation innocently permitted a transfer upon its books of plaintiff's stock upon a forged power of attorney, cancelling the certificates and issuing new ones: *Held*, that it was bound to transfer an equal quantity of its stock to plaintiff or pay its value." 7 N. Y. (3 seld.) 274, *Pollock vs. National Bank.*

"Property in stock is not transferred from the owner by being placed under a forged power of attorney to the name of another person in the books of the corporation." Common Pleas, 1824, *Davis vs. Bank of England*; 2 Bingham, 393; 3 L. J. 4; 9 Moore, 747.

The Court will not grant an interpleader in the case of a forged transfer. 12 C. B. 458, *Dalton vs. Midland Railway Company.*

22 Eng. L. & Eq. 452.

4 Allen, 277.

This and the case of the Telegraph Company vs. Davenport (97 U. S. 369) are identical, with the exception that in that case the name of the owner of the stock had been forged, whereas in this, Pierre DeVerges falsely represented himself as agent.

In both cases the transfer was obtained through misrepresentation and fraud. Whether the signature was genuine, with no right to sign, or whether the signature was forged must be considered as one and the same thing in law, for neither signature can produce any legal effect.

In its opinion, this Court said: "Forgery can confer no power, nor transfer any right. The officers of the company

are the custodians of its stock and books, and it is their duty to see that *all transfers* of shares ore properly made, either by the stockholders themselves *or persons having authority from them.* If upon presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, *or if not satisfied of the genuineness of a power of attorney produced*, they can require the identity of the party in the one case and the genuineness of the document in the other to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility.

"In many instances they may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title and who may perhaps have acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the Company, in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the process of the law, requires, in the cases mentioned, that the property wrongfully transferred or stolen, should be restored to its rightful owner. The maintenance of that principle is essential to the peace and safety of society, and the insecurity which would follow any departure from it would cause far greater injury than any which can fall in cases of unlawful appropriation of property upon those who have been misled and defrauded."

We must indeed ask the forbearance of the Court for having trespassed on your time by citing so many authorities in a case which requires none; in a case where complainant's rights are so clear, and where the defense is so palpably false and inequitable.

The judgment of the lower Court, which contains no reasons

in its support, and which dismissed complainant's bill, should be reversed and judgment should be rendered in favor of complainant, ordering the defendant Company to deliver to plaintiff a new certificate of stock and to pay her all the accrued dividends, with legal interest from the 1st of April, 1876, and her *pro rata* distribution of the assets of the defendant corporation.

Respectfully submitted,

CHS. LOUQUE,

Of Counsel.

127-614

FILED.
JAN 9 1888

UNITED STATES SUPREME COURT.

No. 139.

ERMANCE DE ST. ROMES

versus

THE LEVEE STEAM COTTON PRESS COMPANY.

Appeal from the United States Circuit Court, Eastern District of Louisiana.

Additional Brief of Appellant.

I.

THE CLAIM OF PLAINTIFF.

Miss Ermance de St. Romes claims to be the owner of sixty-six (66) shares of the stock of the Levee Steam Cotton Press Company, which she acquired by inheritance from her brothers, Ernest and Victor de St. Romes, and with them as heirs of another brother, Eugene de St. Romes, to whom, with all the rights attached thereto he acquired from their mother, Mrs. Widow de St. Romes, on the 23d day of November, 1867, said transfer being notified to said

Company, and of which it took judicial cognizance on 15th June, 1868; forty-three (43) shares of which stock she (Mrs. Widow de St. Romes) acquired as per certificate of stock 30th January, 1845, and twenty-three (23) shares as per certificate of stock 18th December, 1845, issued to her by said Company, Nos. 814 and 838. For statement see Record, p. 1.

For certificate see Record, p. 86.

For order of inheritance and renunciation of Widow de St. Romes see Record, p. 50.

For admission of sole heirship see Record, p. 46.

For transfer of Widow de St. Romes to Esnest de St. Romes, subrogation, order and notice see Record p. 53.

The secretary of the defendant corporation wrote "cancelled the 29th July, 1853," across the face of the certificates by mistake and in fraud of and against the will, wishes or authority of the Widow de Romes, and said corporation have ever since refused to recognize her, her heirs or assigns as owners of the 66 shares of said stock, but that neither she nor said Ernest, Eugene nor Victor de St. Romes, nor plaintiff complainant have ever acquiesced, but always persistently resisted said act of cancellation and denied the legality thereof by repeated suits and otherwise, as shown by the Record *passim*.

See Bill, Record, p. 2.

That on 11th January, 1861, the Widow de St. Romes sued the defendant Company for dividends on said stock, which on appeal was decided in her favor

by the Supreme Court of Louisiana on 13th January, 1868, and became final 8th June, 1868, for $2376, legal interest and costs.

For statement see Bill, Record, p. 2.

For petition and final judgment see Record, pp. 19 and 20; 20 La. Ann. 381.

That since the time up to which dividends were allowed in the said judgment, other dividends have been declared and the corporation is in process of liquidation and distribution of its assets among its stockholders, and to that end has disposed of most of its property.

For statement see Record p. 3.

The plaintiff prays for relief; an accounting for the dividends from July, 1854; for an issue of new certificates of stock in lieu of those cancelled, and her share of the assets therein, and the final distribution of assets, and for an injunction. Rec. p. 3.

On hearing an injunction *pendente lite* was issued. Record, p. 8.

The showing of defendant in Exhibit A to the answer is 162 per cent. dividends. $10.692 00
And first distribution of assets 45 per cent. 2970 00

Total due besides interest..... $13,662 00

And her share in final disiribution.

See Record, pp. 14 and 15.

The balance on hand for final distribution is between $18,000 and $19,000, about enough to cover the claim, and interests and costs of plaintiff.

See testimony of Denis, the President. Record, p. 76. Exact amount $19,150.

See testimony of Denis, President, Record, p. 79.

II.

The Defence.

The defence admits the original ownership of the 66 shares of stock in Mrs. de St. Romes, but avers she transferred them on the 29th July, 1853, to one C. A. Cohen, through her duly authorized agent, Pierre Deverges (Record, p. 9).

That on the same day Cohen transferred the 66 shares to Peschier & Forstall, and they to A. and M. Heine, who subsequently sold them to various parties.

See amended answer, Record, p. 30.

The defendant sets up *res adjudicata* and prescription of three and ten years (Record, p. 11).

Defendant sets up a suit by Mrs. de St. Romes vs. The Levee Steam Cotton Press, instituted in 1861, for stock and dividends.

Record, p. 10.

And another suit, instituted in 1871, and that though she had in 1867 transferred her claim to her son, Eugene de St. Romes, yet he and his heirs are bound by the decision in that case, instituted 4 years thereafter and decided in 1879, and that the same is *res adjudicata*, as against this plaintiff.

Record, pp. 11 and 12.

That the present plaintiff instituted suit vs. the defendant corporation on 1st April, 1876, which was

finally decided on 13th February, 1882, which suit was dismissed on exception of want of proper parties (not of *res adjudicata*), and this judgment is also set up as final and as *res adjudicata* against the present suit.

Record, pp. 12 and 13.

The answer also sets up want of proper parties; that the persons now holding the stock should be made parties.

Record, p. 13.

In amended answer (Record, p. 30 and 31) defendant sets up that its charter limits its shares to 5000, and that its stock is now held by other parties and the corporation has no power to increase the number of shares by the 66 shares claimed, and gives a list of names, whom it pretends should be made parties defendant.

Record, p. 30.

But in an amended and supplemental answer (Record, pp. 37 and 38) the defendant again sets up that it was mistaken in the fact in which it said that A. and M. Heine had sold 99 share of stock to H. Gally, in which the 66 shares in controversy were included, but that A. and M. Heine owned many other shares of stock in the defendant corporation, some purchased prior to their purchase of the 66 shares, and some subsequently thereto, and that the shares of stock held by the said A. and M. Heine were so intermingled that it was impossible to trace the 66 shares further, and that A. and M. Heine now held no stock in the corporation.

III.

Statement of Pleadings and Facts.

1. On the question of res adjudicata.

On 11th January, 1861, Mrs. Widow de St. Romes filed suit against the Levee Steam Cotton Press Company in the Fifth District Court of New Orleans, in which she set up her ownership of the 66 shares of stock and claimed the dividends thereon declared since the year 1848.

Record, p. 18.

The judgment of the lower court adverse to her, was reversed by the Supreme Court on 13th January, 1868, in which the plea of prescription was overruled, and the question on the merits, as to the authority of Pierre Deverges to sell the stock was passed upon and also the sale by and authority in him; that the testimony failed to show any authority in him to receive dividends or sell the stock.

Record, p. 19.

But on application for a rehearing the Court said that as the alleged transferree of the stock was not a party to this suit, her claim to be recognized as the legal owner of the stock be reserved.

Record, p. 20.

On 23d November, 1867, Mrs. Widow de St. Romes transferred her claim against the Cotton Press Company, then pending in the Supreme Court of Louisiana, to Eugene de St. Romes for valuable considerations received, which was filed in Court on

9th June, 1868, and made executory and service of subrogation served on the defendant corporation on 9th June, 1868.

Record, p. 53.

The judgment of the Supreme Court having been levied on by the Sheriff on 15th June, 1868, by a judgment creditor of Widow de St. Romes (Record, p. 57). Eugene de St. Romes, the subrogee thereof, filed his opposition, and which was finally decided in his favor 3d July, 1868 (Record, pp. 58 and 59).

These judicial proceedings most conclusively negative the allegation in defendant's answer, that it has no knowledge or belief that the Widow de St. Romes ever executed any alleged assignment of said stock to Eugene de St. Romes. (Record, p. 10.)

If *res adjudicata* is proved in this, it is against the defendant.

The defendant sets up as a foundation for another plea of *res adjudicata*, that on 20th June, 1871 (over three years subseqent to the transfer of her claim to Eugene de St. Romes as above, and two years after notice to it of the transfer), Mrs. de St. Romes sued the defendant corporation, one of her attorneys being Mr. Miller, the attorney of the defendant in this case, in which she set up ownership of the stock and the dividends thereon, making parties to the suit the persons previously alleged to be the owners of her 66 shares at various times, (Record, 24 to 26) and the judgment of the Supreme Court thereon of February 10th, 1879. (Record, pp. 24 ahd 27.)

31 La. An. 234.

And this notwithstanding she filed a disclaimer of ownership, and that the suit was brought in error, setting up the transfer by her in 1867, and of which the defendant then and now had full knowledge, as shown above.

The judgment was in favor of the alleged owners on the plea of prescription, and was rendered while another suit was pending between the present parties, Ermance de St. Romes vs. The Levee Steam Cotton Press, filed 1st April, 1876, being a suit for the dividends on these 66 shares of stock.

Record, pp. 20 and 21.

Another plea of *res adjudicata* is based upon a suit of present plaintiff vs. this defendant filed as above, 1st April, 1876, claiming dividends on these shares of stock, the same as claimed in this suit (Record, pp. 20 and 21), which, as stated in their answer (Record, p. 13) was decided by the Supreme Court of Louisiana and dismissed on the "defendant's exception of want of proper parties." Judgment of the Louisiana Supreme Court rendered 13th February, 1882. (Rec. pp. 21 to 23.)

34 La. Ann. 419.

Thereupon, on 9th December, 1882, this suit was brought in the Circuit Court. Rec. p. 1.

IV.

Want of Proper Parties.

The defendant sets up in its answer and amended answer that the stock (66 shares) held by

Mrs. Widow de St. Romes was by her transferred through her attorney in fact, Pierre Deverges, on the 29th June, 1853, to one J. A. Cohen, and by him on the same day to Peschier & Forstall, and by them on the same day to A. and M. Heine, who subsequently sold their stock to H. Gally, and that he is the one to be made defendant in this suit. (Record, pp. 9 to 13, and 30 and 31.)

But in an amended and supplemental answer (Record, pp. 37 and 38) H. Gally made a party' having denied that he held the shares which belonged to the Widow de St. Romes (Rec. p. 35), the defendant sets up the various purchases and transfers of stock by said A. and M. Heine, and show that it is impossible to trace the 66 shares into the hands of any person, and allege that they "have became mingled with and included in the 5000 shares of the capital stock of this Company, all owned by the present shareholders of this Company." (Record, 38). For which and lists of transfers and stockholders see Rec. pp, 39 to 42.

Orally it was insisted in the Circuit Court that the case was a stale one, but the Record of the various suits brought as given in detail in the foregoing show a persistency on the part of the plaintiff and her authors, which nullifies any force in such a defence.

A final decision was not reached on the first suit till 1868, and all the other suits, including the

suit of Mrs. de St. Romes, filed in 1871, were dismissed on exceptions of want of porper parties. The defence was so managed, that after the first case, the merits were never reached.

The remark of Justice Poche, of the Louisiana Supreme Court, that the "litigation touching these identical shares of stock, which has been violent, persistent and very protracted," precludes any idea of staleness from being seriously entertained.

Record, p. 17.

34 La. Ann. 419.

V.

AGREEMENT: RES ADJUDICATA.

Three judgments have been rendered upon the subject matter of this case in the State Courts of Louisiana.

The *first* case was that in which the Widow de St. Romes was decreed to be entitled to certain dividends on this stock, decided in June, 1868.

The organ of the Supreme Court says that "a careful perusal of the testimony in the Record [the identical testimony in this case], the fact of the destruction of the company's papers being borne in mind, has failed to satisfiy us that Deverges was clothed by the plaintiff with authority either to receive her dividends for the years in which they are now claimed, or to sell her stock in the Company."

And on rehearing it was said that as the alleged transferree of the stock was not a party to this suit, the plaintiff could not justly be recognized as the

owner of the stock in question; but we think a legitimate sequence to our opinion, heretofore expressed, is a reservation of her right to claim said stock in a proper proceeding."

20 La. Ann. 381.

The *res adjudicata* in the case above cited is in favor of the present plaintiff.

The *second* case was that of Widow de St. Romes vs. the Levee Steam Cotton Press Company decided by the Louisiana Supreme Court in March, 1879, and simply sustained a plea of prescription as against Cohen, Miltenberger and others, alleged transferrees of the 66 sharess of stock.

But the plaintiff in this *second* case was, at the time of the institution of the suit, 1871, not the owner of the claim, having transferred the same to Eugene de St. Romes in 1867, from whom the present plaintiff inherited, nor were Cohen and others named owners of the stock. The parties are, therefore, not the same and the present plaintiff, was not privy to that suit, nor is, nor can she be bound thereby.

The Supreme Court of Louisiana though the proof of thetransfer of Mrs. de St. Romes, long before the institution of the suit was in the Record and brought to its attention, declined to pass upon her absolute want of interest, ignoring that point and deciding the case on plea prescription.

31 La. Ann. 224.

A citation of authorities to show that this case does not sustain the plea of *res adjudicata*, would be imposing upon the intelligence of this Court.

The *third* case was that of this plaintiff vs; the present defendant, and was pending in Court when the second case as above was decided. This third case was between the same parties, was decided by the Supreme Court of Louisiana in March, 1882.

The decision in that case was rendered wholly on the ground, that "said stock being claimed by third persons, the adverse rights of such persons cannot be disposed of in a suit to which they are not parties, and that the District Judge erred in overruling defendant's exception based on these grounds. This conclusion precluded the necessity of inquiring into the other numerous points raised in the pleadings."

Record, p. 17.

34 La. Ann. p. 422.

The only point decided in this *third* case is, as to the making the proper parties; namely, as stated by the decision: "1st. Want of proper parties necessary to a final adjudication."

Record, p. 15.

To ascertain whether this decision is such as to cause an estoppel, we must look to the pleadings and Record in this case. It is set up in the answer as constituting *res adjudicata*. But is it? Were there any parties other than the present defendant, necessary or even possible, as the facts of this Record show? If none were possible, certain the decision cannot be *res adjudicata* as to others or in favor of the present defendant.

How does the Record stand and what does it show as to other parties necessary to the suit?

In every suit referred to in the Record the defendant has set up the ownership of the 66 shares of stock in question in other parties, sometimes indefinitely, sometimes naming one set of persons and sometimes another set.

The attorney of the present defendant, then as one of the attorneys of Widow de Romes, in the petition filed 20th June, 1871; for her, names Alexander Graihle, G. Miltenberger and W. C. C. Claiborne as the then owners of the stocks, in what proportions then impossible to designate, and as having derived them through C. A. Cohen, Peschier & Forstall and A. and M. Heine.

Record, p. 25.

This the Louisiana Supreme Court say was sufficient notice to the present plaintiff and conclusive, that she knew who the proper parties were.

34 La. Ann. 422.

The defendant in suit, the third one of the cases in the State Court, sets up the name of the owners and called them in warranty, which call was stricken out, which the Supreme Court said should not have been done, and decided nothing else.

Record, p. 22.

34 La. Ann. 422.

In this case the defendant in ansswer sets out the transfer of this stock by Deverges, agent, to C. A. Cohen, by him to Peschier & Forstall, by them to A. and M. Heine, all on 29th July, 1853, and by the latter 4th of May, 1882, to H. Gally, and named him as the

then owner of the whole 66 shares of stock, and for the first time appearing, all the former parties being ignored,

Record, p. 11.

The Circuit Judge then ordered the plaintiff to make H. Gally a party to the suit, as he was not one of those named in the pleadings in the State Courts. The decision then rendered could not be *res adjudicata* as to him, and as the defendant Company had not in those suits given us the name of Gally; but the names of other parties, *now stated under oath, not to be the proper parties*, and thereby formerly attempting to mislead us and cause delay, all of which was most effectually accomplished. The decision in this third case, now set up as *res adjudicata*, should not avail them. All this as to the ownership of the 66 shares of stock to the proper parties (namely, H. Gally) is reiterated in the amended answer.

Record, p. 30.

Mr. Gally was called in on the petition of the defendant and order of Court thereon (Record, pp. 32 and 33), and he answers by denying that he is the owner of the 66 shares of stock filed 7th May, 1883.

Record, p. 35.

Finally defendant comes into Court, and by its amended and supplemental answer, filed same day May 7th), and after replication to the original and amended answers, and without order or permission of Court, and without notice to plaintiff's counsel, but which was permitted after an unsuccessful attempt to

striket he same from the Record on 9th June, 1883.

Record, pp. 37 and 44.

In this the defendant sets up error in declaring the ownership of the 66 shares of stock to be in H. Gally, and says, but this statement of ownership in H. Gally is in part erroneous, or is, at least, to be qualified by the facts hereinafter stated."

Record, p. 37.

And then going on with a statement of facts and with tables of transfers and accounts and ownership of stock annexed, allege that "all the shares acquired by said purchases from said A. and M. Heine have been sold and transferred to various parties with other shares possessed by said purchasers as shown by said exhibit; these parties have in turn and in like manner sold, and these sales and transfers have been repeated by each successive vendor in the numerous sales and transfers during the long period of these transactions *until by the effect of all these sales and transfers, all the shares ever owned by said A. and M. Heine (519 shares) have become mingled with and included in the five thousand shares of the capital stock of this Company, all owned by the present shareholders of this Company.*"

Record, p. 38.

This is the last declaration by the defendant of the present ownership of the 66 shares of stock in controversy, and shows what we have been attempting to get from the defendant since 1861, a period of 22 years.

It shows that what we suspected at the beginning was true that the Company *owned* the stock, for the stockholders, collectively, constitute the Company, and that all the time we have been making the proper parties; namely, the Levee Steam Cotton Press Company. It is, in the light of this statement, that we insist that the plea of *res adjudicata* does not apply—as resulting from the decision in 34 La. Annual Reports.

The conclusion necessarily follows that the defendant without authority (see judgment and reasons in 20 La. Ann.) cancelled the certificates of our 66 shares of stock on 29th July, 1853, and placed that number of shares, on the same day, to the credit of A. M. Heine, then and subsequently large stockholders in the Company, *and thus watered the stock* to the extent of 66 shares, against the consequences of which act the Company now seeks to protect itself by depriving us of our stock.

All the confusion set up by the defendant results from its own illegal and unauthorized acts done to our detriment, which this suit is intended to remedy.

The only possible defence is that Pierre Deverges was authorized to sell the stock. This, in the suit filed in 1861, the Company utterly failed to show. It has, in this case, introduced no new or additional testimony on this point, but relied upon the identical testimony taken in that case.

But there is other corroborative testimony sustaining the want of authority in the "stock transfer

book" introduced in this case; where, as shown in the Record (pp.), authorizations to sell were in many instances posted over the transfer on the book; in others, the transfer was made on the backs of the certificates, where the cancelled certificates have been preserved. But, in this case, there is no authorization to sell posted over the transfer, nor a transfer found on the back of Mrs. Widow de Romes' certificates, which certificates have been preserved and are in evidence.

The presumption, then, from this negative testimony is, that Deverges had no authority to sell.

The conclusion, it is submitted, is irresistible, that the plaintiff is entitled to all the rights of owner of sixty-six (66) shares of stock in the Levee Steam Cotton Press Company, and that as such is entitled to the dividends declared since 1853, admitted to be, in the the aggregate, one hundred and sixty-two dollars ($162) per share $10,692 00

And to the distribution dividend of forty-five dollars ($45) per share..... ..... 2,970 00

Aggregating the sum of.....$13,662 00

With interest from judical demand, 9th December, 1882, and costs, and to share in the surplus on any final dividend of the assets on the final liquidation of the affairs of the corporation.

Respectfully submitted.

J. Q. A. FELLOWS,
Of Counsel.

127-614

JAN 4 1888

Supreme Court of the United States.

No. 139.

ERMANCE DE ST. ROMES

versus

THE LEVEE STEAM COTTON PRESS COMPANY.

Brief for the Levee Steam Cotton Press Company, Defendant and Appellee.

W. A. MAURY,
Solicitor for Defendants

L. GRAHAM & SON, PRINTERS, 101 GRAVIER ST., N. O.

Supreme Court of the United States.

No. 139.

ERMANCE DE ST. ROMES

versus

THE LEVEE STEAM COTTON PRESS COMPANY.

Brief for the Levee Steam Cotton Press Company, Defendant and Appellee.

STATEMENT OF PLEADINGS AND FACTS.

The complainant and appellant, Ermance de St. Romes, on the 9th of February, 1883, filed her bill in equity in this suit against the Levee Steam Cotton Press Company, the defendant and appellee, asserting title to sixty-six shares of the capital stock of the defendant Company, a corporation established by law, and asserting title also to the dividends accrued upon the stock since the year 1853. The Complainant avers she acquired the stock by inheritance from her brothers Ernest and Victor de St. Romes, and with them, as heirs of Eugene de St. Romes, to whom the Complainant alleges her mother, the Widow de St. Romes, had transferred the sixty-six shares. It is alleged in the bill that neither the Complainant, or those from whom she acquired, ever transferred the shares; that the Company, "by mistake and in fraud of the rights of Widow de St. Romes," on the 29th of July, 1853, cancelled her certificates of stock, and ever since has refused to recognize her, or her heirs and assigns as owners. The bill charges that in a suit brought by Widow de St. Romes in 1861, the Supreme Court of the State awarded to her the dividends down to 1853, and adjudged the Company had no right to cancel the certificates. The bill avers that

dividends have been made by the Company since 1853, which should be accounted for, but the Company refuses to pay. It is averred that the Company is about winding up its business, dividing its assets, refusing to recognize the Complainant in the distribution. The bill prays for an injunction to restrain this distribution, to the prejudice of Complainant; that the Company be decreed to issue to her a "new and original" certificate for the sixty-six shares, and to account for the dividends and for her distributive share of the assets of the Company. Bill, Rec., pp. 1 to 3.

The answers of the defendant, the Levee Steam Cotton Press, deny that Complainant has any title to the shares sued for, and aver that the shares claimed by her under the alleged transfer of Widow de St. Romes, in 1867, were, in fact, previously, on the 29th of July, 1853, sold and transferred by Widow de St. Romes, acting through her duly authorized agent, Pierre Deverges, to Charles A. Cohen; that the certificates for the shares of Widow de St. Romes were then, on the 29th of July, 1853, surrendered by her agent, Deverges, to the Company, to be cancelled, were cancelled, and new certificates issued to the purchasers; that numerous transfers have been made by Cohen and those claiming under him; that ever since 1853 Cohen and the transferees have been in possession of the stock as the lawful owners thereof, receiving the dividends thereon. The answers suggest the defectiveness of the bill in not making parties those who bought and hold the shares under Deverges' sale, averred H. Gally to be the then owner, but it turned out that there had been numerous transfers of the stock since 1853, and such mingling of the shares with others possessed by those who made the transfers, that it was extremely difficult, if not impossible, to determine who was then in 1883 the holder of the sixty-six shares. (Test. Seavey, pp. 67, 69, 70.) The answer pleads also the defences of *res judicata* based on judgments of the Supreme Court against Widow de St. Romes and

against the Complainant, and there is pleaded also the prescription of three years and of ten years established by the articles 3506 and 3544 of the Civil Code, the first prescription giving title to movables after three years' possession in good faith, and the last bars all personal actions after the lapse of ten years. See answer and supp., Rec., pp. 9, 30, 32.

The Complainant filed a supplemental bill making H. Gally a party, as holder of the shares, and he also answered. But, as stated, the difficulty developed itself of determining who was the holder of the sixty-six shares, blended as they had become in the transfers of thirty years, with the mass of the five thousand shares representing the capital all extant in the hands of holders. Rec. pp. 32, 35.

The suit was heard on bill, answers and testimony. The decree was against the Complainant, dismissing her bill. From that decree she appealed. Rec., pp. 96, 97.

Widow de St. Romes, under whom the Complainant asserts title, was the owner of the sixty-six shares of stock of the defendant company involved in this controversy. The Complainant alleges title to their shares under a paper executed by Widow de St. Romes in 1867, purporting to transfer the shares to her son Eugene, who died, leaving brothers and his sister, the Complainant; the brothers died and the Complainant sues for the shares as heir of her brothers. See transfer of 1867, and proceedings in the Successions of Complainant's brothers. Rec., pp. 49, 50, 51, 53. But long before 1867 the date of this transfer under which the Complainant asserts title, that is to say, on the 29th of July, 1853, these sixty-six shares, then belonging to Widow de St. Romes, were sold to Charles A. Cohen, who also sold, and there have been numerous subsequent sales of the stock in the last thirty years by those claiming under Deverges' sale. This sale of the sixty-six shares was made by Pierre Deverges, who signed the

transfer on the books of the company as agent of Widow de St. Romes. He surrendered her certificates to make the sale, they were cancelled, new certificates delivered to the purchaser, and ever since 1853 the purchaser and those claiming under him have been in possession as owners of the shares, receiving the dividends on them. See testimony of Seavey, Rec., pp. 66 to 70; transfer of Deverges, agent of Widow de St. Romes, to C. A. Cohen, p. 65. See the cancelled certificates and the transfer attested by the secretary of the company, since deceased, p. 86; admission, pp. 91, 92.

But in 1861, nearly a quarter of a century after Deverges had, without dissent on her part, commenced to collect the stock dividends paid to him down to 1853 (R., p. 85), and eight years after he sold her stock, it occurred to the Widow de St. Romes to dispute his authority, claim the repayment of all the dividends, and put forward the pretension that she still owned the stock. Accordingly, on the 11th January, 1861, she instituted her suit in the Fifth District Court for the Parish of Orleans, for the stock and dividends. Rec., p. 18. About the same time she projected a similar suit against another corporation, the Orleans Insurance Company, in which she owned stock, but that company was so fortunate as to be able to produce the power itself, under which Deverges collected the dividends; and thus defeated her suit to compel a second payment of the dividends already paid to her agent. Tuyes' test. Rec., pp. 63, 87. Power, p. 88.

The disavowal first by Widow de St. Romes in 1861, and again by the Complainant in this suit, of the authority of Deverges in the year 1853, to sell the stock for which this suit is brought, compels this Company, in support of that authority, to resort to presumptive proof of his agency exercised more than thirty years ago, not questioned when it was exercised or for years afterwards.

The evidence of Deverges' agency to sell the stock of Widow de St. Romes in 1853, administered by the Company to repel the Complainant's demand for the stock and dividends accrued since that year, it will be found extends also to his agency to collect the dividends prior to 1853, although these dividends prior to 1853 were recovered by Widow de St. Romes in the suit brought by her in 1861, and hence are not in controversy in this suit; but on the issue in this case of his agency to sell the stock, it has been deemed pertinent along with the testimony of his power to sell the stock, to produce also the testimony of his agency to collect the dividends, paid to him down to his sale in 1853.

The first suit (R. p. 18), to which allusion has already been made, brought by Widow de St. Romes against the Company in 1861, was not tried till 1865. See the continuances of the case to 1865. Rec., p. 56; judgment, p. 94; Rec., pp. 56, 18. It was tried under great disadvantages to the defendant. Death had deprived the Company of the testimony of F. J. Forstall, their secretary, qualified by his duties to know of the payment of the dividends and of the vouchers for their payment, and whose initials attested the transfer by Deverges, as well as the cancellation of the certificates held by him. See testimony of Chaery, p. 85; see initials on cancelled certificates and on transfer. Rec., pp. 65, 86. Deverges, whose authority she impugned, was also dead, having died but a few months before the trial. Admission, Rec., p. 55. In the disorder incident to the occupation of the city in 1862 by the military forces of the United States, the records of the Company had been seized and for the most part destroyed. Testimony of Chaery, p. 85.

Yet still, the Company has established by indubitable evidence that the relation between the Widow St. Romes and Pierre Deverges was that of principal and agent; that

he acted as her agent, attended to her business and was generally recognized as such in this community. Testimony of Tuyes, Rec., pp. 63, 87. He had accounts with her as an agent down to 1859. Testimony of Laresche, p. 88. Allusion has already been made to the fact in proof that during the same period of his acts in respect to her stock and dividends in the Company sued here, he unquestionably had the power to collect her dividends from the Orleans Insurance Company, emphasized by the fact, that she denied it and persisted in that denial until the Company confronted her with the power. See testimony of Tuyes, Rec., p. 63, Power, p. 88.

Then too, this company has been able to produce the order under which Deverges collected the first dividend on her stock not sued for, that of 1845. Again, it is established that of the dividends collected by Deverges, two of them, were paid in checks on the Bank of Louisiana, drawn to her order; that these checks were paid to Deverges on his endorsement as her agent, and, besides, there is the testimony of the bank's teller that her power to Deverges was filed with the bank. See testimony of Chaery, p. 85; testimony Willoz, p. 87. It is proved also, that from 1848 to 1861, a period of thirteen years, this Company declared its dividends from time to time, and all the dividends thus declared were paid first to Deverges and afterwards to the purchasers of the stock. See test. Chaery, p. 85. See list of dividends, p. 14. In all this entire period andd own to her death in 1881, it is shown that theWidow de St. Romes was a resident of this city, and it is to be presumed was not wholly inattentive to current business events concerning her interest. R. p. 46. It is impressive, however, that in this long space of time from 1848 down to 1861, with dividends on her stock declared from year to year, and regularly paid first to Deverges down to 1853, and afterwards to the purchasers to whom he had sold, no call was ever made by her on this Company in respect to her dividends, nor did any murmur of complaint ever come from her against the sale

of the stock made by Deverges in 1853. See testimony of Chaery, p. 85. Finally, it is the incontestable fact that Deverges was in possession of her certificates of stock when he made the sale in 1853, and no explanation has ever come from her or from any one why he should have had possession of the certificates, unless to make the sale he effected.

There have been no less than three suits in the State Courts, brought against the Company in respect to this stock —two brought by Widow de St. Romes, and one by Complainant herself. In first suit brought in 1861 by Widow de St. Romes for the stock and dividends, she recovered judgment for the dividends down to 1853. As to the stock the Court held she could not maintain the suit without making parties the purchasers under the sale of 1853, and her right to bring such a suit was reserved. The decree of the Supreme Court of Louisiana rendered on the 13th of January, 1868, that she could not sue for the stock sold by Deverges in 1853, without making parties the purchasers, is pleaded as *res judicata* in bar of the Complainant's bill, directed as it is again, against the Company alone.

On the 30th June, 1877, Widow de St. Romes brought another suit in the Sixth District Court for the parish of Orleans in which she again claimed the dividends and sued also for the dividends accrued since 1853. In that suit alleging that A. Grailhe, G. Miltenberger, and W. C. C. Claiborne were transferees of the sixty-six shares, she made them parties, thus conforming to the decision in her first suit. While this suit was pending on appeal to the Supreme Court, doubtless, anticipating an unfavorable decision, she made an attempt to discontinue the appeal and withdraw the case from the Court. The suggestion she made in that connection was, that she had found from the documents produced by defendants, that before the institution of the suit she had assigned the shares of stock to her son, and that her suit was brought in error. The Supreme Court refused to permit her

to withdraw the appeal, and proceeded to decide the case. The decision was again against her maintaining the prescription of three years pleaded by the defendants and that decision of the Supreme Court of the State rendered 10th February, 1879, the defendant also pleads as *res judicata* in bar of the complainant's bill. Rec., pp. 24, 26, 12.

But this discomfiture only led to another suit in the Superior District Court for the parish of Orleans, brought by the present Complainnant on the 1st of April, 1876, in which she sued for dividends since 1853, making the Company the only defendant. The Company drawn thus into this fresh contestation again appeared and defended, and the suit was decided against her by the Supreme Court; the Court again holding that the suit could not be maintained without making parties the purchasers of the stock. (Rec. pp. 20, 15.) This judgment is also pleaded in the case as *res judicata* in bar of the Complainant's Bill.

It is after all these decisions that the complainant seeks by her bill in this case, to revive the controversy.

ARGUMENT.

The question of Deverges' agency to sell the stock in controversy is not concluded, as the Complainant's bill undertakes to affirm, by the decree of the Supreme Court rendered in 1861. That decree was in favor of Widow de St. Romes for the dividends collected by Deverges down to 1861, and on the rehearing, the decree was amended so as to reserve her the right to sue for the stock sold in 1853. Thus, all that the Court determined was the right to dividends down to 1861, and that the suit for the stock could not be maintained against the company alone. True, the Supreme Court expressed itself not satisfied that Deverges had authority to collect the dividends, hence the Court gave judgment for them. See Rec., pp. 19, 20. The *res judicata* in the case, however must be sought alone, in the

decree, and it is manifest that under the decree of 1861, the issue of Deverges' agency to sell her stock in 1853, is not adjudicated. It is believed the testimony produced in this case on this point, will abundantly satisfy this Court that Deverges did have the authority to sell the stock, and if that issue is maintained, it disposes of this suit, brought as it is for the stock and dividends accrued since Deverges' sale in 1853. To this branch of the case attention will be first directed.

The power under which an agent has acted, is often owing to the casualties of life, lost, mislaid or destroyed, particularly when no question of authority was made when the acts were performed, or for years after. A paper that has thus served its office, especially with the lapse of time, is apt to be dismissed as not worthy of special care. But when an agency is sought to be disavowed years after the acts of the agent, to the prejudice of those who have dealt with him, it is fortunate that the acts and conduct of the parties afford in most cases proofs of the agency, as cogent as the power itself. The proof exhibited that the Widow de St. Romes did not attend personally to her business, but availed of an agent; that Pierre Deverges was an agent for her; that she had accounts with him as such during the period embracing the transactions involved in this controversy; that the checks drawn to her order were paid by the Bank on Deverges' endorsement, and as the teller testifies, under her power; that Deverges drew dividends for her from another Company under her power; that denying that power it was produced against her, thus defeating her suit to compel a second payment of the dividends; all this testimony carries a significance of Deverges' agency, which the mind cannot well resist. Her attempt in this case to impugn the authority of Deverges, is surely not commended by her denial of his authority in the other case, when it incontestibly existed. On the contrary, her attempt to repu-

diate his agency in the case of the Orleans Insurance Company, weakens her denial of his authority in this case, and adds to the probative force of all the facts developed in the testimony, to show that Deverges was her agent to sell her stock in this Company and collect dividends. At least, it certainly devolved on the Widow de St. Romes and on her heirs to negative by positive testimony, that although an agent attending to her business, as the witnesses testify, and in instances in which his authority cannot be disputed, yet that he was not her agent in the particular transactions involved in this controversy. No such testimony has been produced, but instead suit after suit has been instituted against the Company for the stock and dividends. Can it be conceived that she would make him her agent with the power to transact business; clothe him with authority to endorse and receive payment of checks; collect dividends from the Orleans Insurance Company, and yet, that she withheld the power it is proved he exercised with reference to the stock and dividends in this Company? On the other hand, is it not a fair inference as he was unquestionably her agent to do the other acts she cannot question, he had also power to do those acts involved in this controversy, now drawn in question, but never disputed when they were done or for years after?

The dividends collected by Deverges prior to 1855, as already stated, are not in controversy here; but as Widow de St. Romes denied his authority to collect those dividends, as she also denied his authority to sell her stock, the proof that he was her agent to collect dividends is not without weight to show that he had authority to sell her stock in the year 1853. It is in proof she gave Deverges the power to collect the dividends of 1845. (Rec., p. 88.) Why should she give him authority to collect the earlier dividends and not the other divldends? Again, two of the dividends were paid in checks drawn to her order on the Bank of Louisiana and were paid by

the Bank on the endorsement of Deverges. These checks were in due course returned to the Company as paid, when the bank-book of the Company was balanced. (Testimony Chaery, Rec., p. 86; Seavey, p. 72.) It is the presumption the Bank was furnished with her power to Deverges, for otherwise assuredly the checks would not have been paid on his endorsement. There is more than the presumption. Mr. Willoz, the Bank's teller, testifies the power was filed with the Bank, though in the lapse of years when the witness testified, the power could not be found. His testimony harmonizes with the presumption, and is conclusive that Deverges had power to endorse the checks. The power to endorse and receive payment of checks drawn for dividends is equivalent to the power itself to receive dividends. Still further, if Deverges was not her agent in respect to her stock and dividends in this Company, how comes it that from 1848 to 1861, being at all times a resident of this city, she made no call on this Company for the dividends or stock? Unless he was her agent, is it conceivable she would have waited from 1848 to 1861, claiming no dividends paid in all that long period first to Deverges down to 1853, and then to the purchasers under his sale of that year? Is it to be supposed that she was ignorant all this time that dividends were being declared and paid by this Company from year to year? Unless Deverges was her agent to sell the stock, is it to be supposed that she would have remained silent till 1861, eight years after the stock was sold by Deverges? On the contrary, does not her conduct avouch that agency which Deverges claimed and unquestionably exercised? Is it not the irresistible inference from her own conduct, that Deverges, being her agent to collect dividends as well as to sell her stock in this Company, the prompting to dispute his authority and take the chances that her power could not be produced or equivalent proof supplied, did not come to her until 1861, about the time she undertook the similar but unfortunate enterprise against the Orleans Company.

There is besides the mute but none the less impressive testimony of the initials of F. J. Forstall, attached to the cancelled certificates of the stock of Widow de St. Romes, and on the transfer to the purchaser, C. A. Cohen. Rec., pp. 86, 66. Mr. Forstall was the secretary of the Company. His initials import that the authority was produced to him, under which the stock was sold by Deverges, the certificates cancelled and the new certificates delivered to the purchaser. Either the secretary was grossly inattentive to his duties, or his attestation must be accepted as affirming the regularity of the transaction. The lapse of time, without question of the sale and cancellation, with all the circumstances of the case, strengthen and confirm the attesting marks affixed at the time by the officer of the Company.

All this testimony is of that species necessarily relied upon in a case like this, in which an authority to sell stock asserted and exercised without dissent in 1853, was never drawn in question until eight years had rolled away; a case in which when that issue [redacted] was tried, the loss of the papers of the Company had intervened, and death had deprived the Company of those witnesses, who, if living, would naturally have been called to maintain the agency of Deverges. All these circumstances are to be weighed in determining the effect of the testimony on this point and contribute to its persuasive force. But there is still another fact of controlling significance. Deverges incontestably had in his possession when he made the sale, the certificates for the stock. He needed the certificates to make the sale. For what other purpose were they placed in his possession? There is no pretence of testimony that the Complainant lost her certificates by accident, and surely none that she was deprived of them by theft. She lived more than thirty years after Deverges collected her first dividend, and nearly thirty years after 1853, when, with her certificates in his hands he delivered them up to make the sale of the stock.

In all these years she and her heirs, have been harassing this company with suits in respect to this stock. Much of the testimony in these old suits has been used in this case, yet in all this time, never did the Widow de St. Romes go upon the stand as a witness, to explain the fact that Deverges had her certificates in his hands. She could have discredited his possession, if, in fact, he had not been placed in possession of her certificates with full authority to make the sale he effected. No word of explanation on that vital point has come from Widow de St. Romes, nor from anyone. This silence, with all the other facts and circumstances, produces absolute conviction that Deverges had authority to sell her stock, and that the Complainants suit which seeks to repudiate that agency deserves no countenance.

It remains to present the defences of *res judicata* based on the judgment of the Supreme Court of Louisiana.

The first suit brought by Widow de St. Romes in 1861, in which the Court held she could not maintain the suit without the presence, as defendants, of the purchasers of the stock, was followed by her suit of 1871. In this suit of 1871, she accepted the condition imposed on her by the decree of 1861. She averred that A. Grailhe, Gustave Miltenberger, and W. C. C. Claiborne were the owners of the stock, she called them in as defendants, and with them she tried the issue of ownership, and that issue was determined against her, maintaining the title of the defendants on the prescription of three years pleaded by them. Widow de St. Romes thus tried her title with those she averred to be the owners of the stock, and it is submitted was bound by the decree against her. Both these decrees of the Supreme Court of Louisiana, rendered respectively the 13th January, 1868, and the 10th February, 1876, are pleaded as *res judicata* in bar of the Complainants' bill. Pp. 12-30.

It is quite true, the Complainant urges she is not bound by this decree of 1876, because rendered after the stock was transferred to her in 1867. But what are the facts? The suit in which the decree of 1876 was rendered was instituted on the 20th of June, 1871. Rec. p. 24. The suit was pending in the District Court from 1871 to 1874. Rec. pp. 24, 89. It was not decided in the Supreme Court till 1876. Rec. p. 26. Is it credible that Eugene de St. Romes, to whom the assignment was made, did not know of this suit for the stock brought by his mother? Is it to be credited that the Complainant herself, becoming the heir of Eugene in 1874, did not also know of her mother's suit? The relationship of the parties, if nothing more, would preclude the supposition that the Complainant and her brother were ignorant that the mother was suing for the stock. Neither has ever disavowed that suit as a witness on the stand. Even in the Complainant's bill, there is no allusion to this suit brought by Widow de St. Romes. The conclurion is inevitable that the suit in 1871, was with the knowledge and privity of Eugene de St. Romes and of the Complainant. It is to be deemed a suit by Widow de St. Romes, the assignor for the benefit of the assignees, to their knowledge and with their approval. It cannot be, that the assignee should be permitted to take the chances of a favorable judgment in a suit brought by the assignor, and in the event of an unfavorable judgment claim that he is not bound. In whose name soever the suit is brought, the judgment binds all for whose benefit it was instituted. If, therefore, Eugene de St. Romes became the assignee of the stock in 1867, the Complainant becoming his heir in 1874, Eugene was in law a party to the suit while he lived, and the Complainant, his heir, was also a party after his death, and is bound by the judgment. The suit is to be deemed her suit, the same as if brought in her name. In enforcing the authority of the thing adjudged "the law looks to the moral, not to the physical identity of the parties—there may be a physical difference, but at the same time a legal identity of the parties. If, without figuring as

a party, one is represented by the plaintiff, the law considers both as one person, and the judgment binds both." Johnson vs. Weld, 8th La. Annual Re., p. 129. When, therefore, Widow de St. Romes undertook to prevent a decision on her appeal by suggesting she had brought the suit in error; "that she had found, from documents produced by the defendant, she had transferred the stock to Eugene de St. Romes, her son, the Supreme Court properly refused her application. Louisiana Code of Practice, Art. 901, The Court proceeded to decide, and it is submitted that decree constitutes *res judicata* against the Complainant.

Yet on the 1st of April, 1876 another suit was instituted in the Superior Distirct Court, for the parish of Orleans, for dividends on the stock accrued since 1853. This suit was also decided by the Supreme Court of the State, on the 13th February, 1882, in favor of the defendant and against the Complainant. The decision like the previous judgments was that she could not maintain her suit for the dividends, without making defendants the parties who held under the sale of 1853. This decree is also pleaded as *res judicata* on that of the Complainants bill. Rec., p. 12, 13.

It is true when the bill was filed in this case in the year 1883, thirty years after Deverges sale, the then ownership of the sixty-six shares in the mingling of the shares in the various transfers, could not be traced. Testimony Seavey. Rec., pp. 67, 69, 70. But the first suit of Widow de St. Romes was brought in 1861, twenty-two years before the present bill was filed. In 1871 when the second suit was brought she averred the ownership of the shares to be in the defendants called in by her with whom she tried her title. The Complainant is precluded from any complaint against the decisions of the Supreme Court, in regard to necessary parties, inasmuch as Widow de St. Romes complied with those de-

cisions, and tried the issue with the parties she judicially averred were the owners of the stock. The issue cannot be tried again.

The shareholder whose shares the corporation has permitted to be illegally transferred, has an adequate remedy at law in damages against the corporation. All can understand that in such a case, the suit is against the corporation alone, to redress the wrong. But here the Complainant has resorted to a bill in equity to compel the corporation to deliver to her a certificate for the shares of stock she claims. True, the bill asks "for a new and original certificate for sixty-six shares of the defendant corporation, in lieu of the certificate cancelled, without authority and by fraud," etc. But this is substantially a demand that this Company shall issue sixty-six shares of stock. The Company was chartered with a capital of two hundred thousand dollars, with the right to increase it to one million. See Rec., pp. 96, 95. The capital was increased by subscriptions to five hundred thousand dollars, represented by five hundred shares, all issued and all are extant in the hands of holders. See Rec., p. 74. No stockholder, whatever his alleged wrong may be, can call on the corporation to violate its charter, and issue more than the number of shares to which its capital has been increased by subscriptions under authority of law. Under this state of facts all the shares of this Company authorized to be issued being extant in the hands of holders, the Supreme Court of the State treated the various suits brought for these sixty-six shares as suits assailing the title of those who held the shares. The view of the Court was that the title could not be tried in a suit against the corporation alone. So the Supreme Court held also in the case of Reid vs. The Commercial Insurance Company, 32d Annual, p. 546. These decisions conclude Complainant especially in view of the

decree against Widow de St. Romes, the Complainant's assignor, in the suit brought against the parties she made defendants, as owner of the stock.

Under the law of Louisiana, the share of stock is a movable. Art. 474, Civil Code. The undisturbed possession of three years of the movable, in good faith, as owner, gives a title, unless the thing was stolen or lost. Civil Code, Article 3506. When Widow de St. Romes brought her first suit for these shares of stock, they had been held by the purchasers under Deverges' sale for a period longer than three years; hence the sale of the purchasers had been confirmed by time. Besides the prescription of three years, which perfected the title of the purchaser to the stock, all personal actions are prescribed by ten years. Civil Code of Louisiana, Article 3544. The purchasers took possession of the stock in 1853, under Deverges' sale. If Deverges' sale was not with authority of Widow de St. Romes, her action against the purchasers in respect to the stock accrued to her in 1853, and was prescribed long before 1871, when she sued the purchasers, and these defences, founded on the prescription of three years and of ten years have been maintained by the Supreme Court of the State. Rec., p. 26. Under the law of Louisiana all actions for torts are barred by one year. Civil Code, Articles 2315, 3556. These prescriptions are all pleaded in bar of the bill. Rec., pp. 11, 30.

The Complainant's case is met by the defences of prescription. It is answered by the defences of *res judicata* Besides, on the issue of fact of Deverges' authority to sell the stock, it is submitted, the evidence presented to this Court demonstrates he had that authority; exercised it when he sold the stock to Charles A. Cohen in 1853, and hence Complainant has no title to the stock. The defences